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# Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.,

*Petitioners,*

v.

HOMER H. JOHNSON,

*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

## REPLY BRIEF OF PETITIONERS

FRANCIS P. MATTHEWS,
RAINEY T. WELLS,
MONROE OPPENHEIMER,
ROBERT E. SHER,
RAYMOND M. CROSSMAN,
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## REPLY BRIEF OF PETITIONERS

### Introductory Statement

It is not intended nor considered necessary to submit an extended brief in reply to respondent's brief in opposition. It is desired, however, to challenge attention to admissions and to a significant omission in respondent's brief and to respondent's argument upon the question of jurisdiction of the subject matter.

## I.

**Respondent admits the issue presented has not been passed upon by this Court.**

In their original petition and brief petitioners urged that "the physical property used in the operation of the station and the license for operation are, both in fact and theory, inseparable" (p. 34) and that this case was of vital public importance (p. 41) and substance (p. 13). This Court has never directly passed upon that question. This, respondent concedes, stating:

> "Nor have any cases been cited holding that the Communications Act vests in the Commission exclusive jurisdiction of *all* questions relating to radio broadcasting stations and equipment * * * ." (p. 29)

This suit involves directly the jurisdiction of the Communications Commission over the physical facilities of a radio broadcasting station as well as the broadcasting license and is therefore of substance and importance, not merely to the petitioners, but to the radio industry and the general public.

## II.

**Respondent admits purpose of this suit was to cancel the lease and the assignment of the license and that the Court below decreed such cancellation.**

The brief of respondent, relying upon the second opinion of the Supreme Court of Nebraska (May 26, 1944, R. 794) claims that the court below conceded the jurisdiction of the Communications Commission over the license and exercised jurisdiction only over the lease and

physical properties as a matter of local law. Yet an analysis of respondent's brief demonstrates clearly that this was not the purpose of the suit, and the judgment of the court below had the necessary effect of nullifying the broadcasting license.

With respect to the purpose of the suit respondent stated in his brief on page 3:

> "On November 23, 1942, respondent, as a member of the lessor, commenced this action to cancel the lease and assignment of the license because they were procured by fraud from the lessor (R. 1-10)."

On page 8 respondent stated:

> "The purpose of the action was to cancel the lease of the radio station because it was procured by fraud, and also to cancel an assignment of the license to operate the station for the same reason (R. 1-10)."

On page 18 respondent stated:

> "Respondent brought the action to cancel a lease of a radio station and assignment of license to operate it because of fraud in procuring the license and assignment (R. 10)."

Obviously, the purpose of the suit which respondent instituted in the state court was to cancel the lease and the assignment of the broadcasting license. Respondent admits that the Supreme Court of Nebraska did this, stating on page 4, paragraph 9:

> "On March 10, 1944, the Supreme Court of Nebraska entered a judgment reversing the trial court, finding that the lease to the station, the lease to the space occupied by the station, and the transfer of the license should be cancelled (R. 744-745). * * *"

While respondent further states (p. 4):

> "On May 26, 1944, the court * * * filed a supplemental opinion in which it stated the jurisdiction of the Commission was only over the transfer of the license; that there never had been any contention to the contrary * * *."

The fact is that the judgment of May 26, 1944 (R. 794), adhered to the judgment of March 10, 1944 (R. 744).

The court's explanation of its judgment in its second opinion (R. 794), referred to in paragraph 12, page 4 of respondent's brief, does not dispose of petitioners' claim that in any event the court, in legal effect, cancelled the assignment of the broadcasting license.

It is immaterial whether the court below purported to cancel the transfer of the license directly or accomplished the same result indirectly by cancelling the lease of the facilities covered by the license. In either event, the effect is the same. The decision below invaded the exclusive jurisdiction of the Communications Commission.

## III.

**Respondent entirely ignores the applicability of Section 402 (a) of the Communications Act.**

On page 5 of respondent's brief it is stated, "The only statute involved is Section 310 (b) of the Communications Act of 1934 * * *. Subsequent references to the Communications Act are to Section 310 (b) unless otherwise stated." There is no discussion whatever in respondent's brief of the controlling jurisdictional provisions of Section 402 (a) of the Communications Act. No authorities with reference to the section are cited. Respondent is content to dismiss consideration of Section

402 (a) in a short paragraph (pp. 21, 22) entitled, "Petitioners Have Not Shown Any Reason or Basis For Respondent to Intervene in Proceedings Before the Commission."

The principle that the orders of the Commission could be challenged only in the United States District Courts pursuant to Section 402 (a) of the Communications Act is discussed in petitioner's brief (pp. 32-38). That respondent had an adequate remedy before the Communications Commission and the United States Courts is clearly recognized by the decisions of this Court.

*Federal Communications Commission v. Columbia Broadcasting System of California*, 311 U. S. 132, 85 L. ed. 87, 61 S. Ct. 152.

*Columbia Broadcasting System, Inc. v. U. S. A., et al.*, 316 U. S. 407, 86 L. ed. 1563, 62 S. Ct. 1194.

*National Broadcasting Co., Inc., et al. v. U. S. A. et al*, 316 U. S. 447, 86 L. ed. 1586, 62 S. Ct. 1214.

*National Broadcasting Co., Inc., et al v. U. S. A., et al*, 319 U. S. 190, 87 L. ed. 1344, 63 S. Ct. 997.

## IV.

**Respondent admits Federal (jurisdiction) question raised.**

Respondent questions whether the motion and answer of the lessee raised the federal jurisdictional question (p. 9) but does not deny that petitioners' motions to dismiss and for rehearing raised the question of the lack of jurisdiction of the Nebraska Courts and asserted the exclusive

jurisdiction of the Communications Commission and the Federal Courts. In this respect, respondent merely urges that this question was raised *"for the first time"* in the motions to dismiss and for rehearing (pp. 4, 8, 11).

That a federal question may be advanced for the first time in a motion for rehearing if the state court entertains the same and considers and decides the question is well recognized and is discussed in the brief of petitioners (pp. 19, 26-28).

Respondent cites (p. 11) three cases which relate to whether a federal question was timely raised, but none of which refers to a federal question involving jurisdiction of the subject matter.

Respondent has failed to recognize the positive distinction existing between:

1. A federal question relating to the jurisdiction of a state court over the subject matter of the action, and

2. A federal question relating to a defense in an action in a state court where admittedly the state court has jurisdiction over the subject matter.

The federal question relating to jurisdiction over the subject matter can be raised at any time by any party to litigation, or if not raised by a party, it will be raised and considered by the court on its own motion.

*United States et al, v. Corrick et al,* 298 U. S. 435, 80 L. Ed. 1263, 56 S. Ct. 829.

The cases cited by respondent (p. 11) are readily distinguishable:

1. *Louisville and Nashville Railroad Co. v. Woodford et al*, 234 U. S. 46, 58 L. Ed. 1202, 34 S. Ct. 739.

The action was originally in the state court of Kentucky to recover damages for the death of some and the injury to others of race horses in the course of railroad transportation. Admittedly the Kentucky Courts had jurisdiction over the subject matter of that action. Verdict and judgment were for the shipper and the railroad company appealed to the Appellate Court of Kentucky. After submission of the cause upon appeal the railroad company for the first time, as evidenced by the record, by supplemental brief, endeavored to inject the defense of a federal right to limit its liability by a written contract for the loss sustained by reason by its being an interstate shipment. This question did not go to the jurisdiction of the Kentucky courts over the subject matter and this Court held that the federal question was not properly or timely presented in the state court of Kentucky, and that, therefore, the federal question would not be considered.

2. *Missouri, Kansas & Texas Railway Co. v. Scaly et al*, 248 U. S. 363, 63 L. Ed. 296, 39 S. Ct. 97.

Likewise, this case involved no question of jurisdiction over the subject matter.

The case was brought in Kansas, involving an interstate shipment of grain from Kansas City, Missouri, to Galveston, Texas. The railway company defended on the ground that the transaction was governed by Missouri law. This contention was overruled, both in the trial court and in the Supreme Court of Kansas. After the

case had pended for eight years the railway company presented the claim that the transaction was governed by federal law. The Kansas Supreme Court held that the contention came too late to be considered. This Court held that the federal question was not seasonably raised.

3. *Herndon v. Georgia,* 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794.

This case was a criminal prosecution instituted under a section of the Penal Code of Georgia. The defendant was convicted and the conviction affirmed on appeal. The case was appealed to this Court and the statute assailed as contravening the due process clause of the Fourteenth Amendment. The constitutional question was not properly raised in the state court. This Court held that the federal question was not timely raised.

Respondent has overlooked a distinction between these cases and the case at bar, in two particulars:

1. The instant case involves directly the question of exclusive federal jurisdiction over the subject matter.

2. The federal question was considered and decided adversely to the contentions of the petitioners in the opinions and judgments of the court below on May 26, 1944 (R. 793-799).

The court below recognized the right of petitioners to raise the jurisdictional question in the motions to dismiss and the motions for rehearing, and considered and decided that question adversely to petitioners (R. 798).

That petitioners properly and timely raised the federal jurisdictional question in the court below is well

established by decisions of this Court cited and quoted in the brief of the petitioners (pp. 19, 20).

The universal rule followed by this Court is succinctly and definitely announced in the case of *McKay v. Kalyton*, 204 U. S. 458, 51 L. Ed. 566, 27 S. Ct. 346, cited in petitioners' brief. In that case this Court considered the manner and time of raising a federal question, not jurisdictional, to give this Court jurisdiction to review the decision of the court below, and stated:

> "It is contended that we are without jurisdiction because no title, right, or immunity was specially set up or claimed under any Federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and that the right to the immunity so asserted under an act or acts of Congress was expressly considered and denied by the state court. True it is that the immunity which was asserted was first claimed in a petition for rehearing; but, as the question was raised, was necessarily involved, and was considered and decided adversely by the state court, there is jurisdiction. Leigh v. Green, 193 U. S. 79, 48 L. Ed. 623, 24 Sup. Ct. Rep. 390."

## V.

**Jurisdiction of the subject matter cannot be conferred or waived.**

Petitioners' contention has been and is that the courts of Nebraska at no stage of the proceedings in this case had jurisdiction over the subject matter. No principle is more universally recognized and applied than that jurisdiction over the subject matter of an action cannot be

conferred upon a court or waived by pleadings, acts, or conduct of the parties. Jurisdiction over the subject matter is present or absent as a matter of law.

Yet, respondent urges in his brief (pp. 8-10), but cites no authorities, that the petitioner Society and its officers admitted jurisdiction in their answer; that all peitioners by their conduct sought the jurisdiction of the Nebraska Courts on the merits by asking affirmance of the trial Court judgment and that the lessor and lessee recognized the State Court jurisdiction by filing a joint application with the Communications Commission to extend the time for transferring to the lessee the Station and License "until final adjudication of the action pending in the District Court of Douglas County, Nebraska."

In *Mitchell, Insurance Commissioner v. Maurer et al,* 293 U. S. 237, 79 L. Ed. 338, 55 S. Ct. 162, this Court stated the general proposition in this language:

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction but also of that of the lower courts in a case under review."

In *Venner v. Michigan Central RR Co.,* 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444, this Court held that if a state court was without jurisdiction the federal court could acquire none by removal.

Finally this Court said in *United States et al v. Corrick et al,* 298 U. S. 435, 80 L. Ed. 1263, 56 S. Ct. 829:

> "If the record discloses that the lower court was without jurisdiction, the Supreme Court will notice

the defect although the parties make no contention concerning it."

The Court below, in its opinion, May 26, 1944 (R. 794) recognized that the question of the lack of its jurisdiction over the subject matter and the question of exclusive jurisdiction of the Communications Commission over the subject matter were before the Court for consideration. These questions were considered, the jurisdiction of the court below sustained and jurisdiction of the Communications Commission denied, upon the theory that the question of jurisdiction "was eliminated from the case by the pleadings they (petitioners) filed in their own behalf," (R. 794) or in other words, that the petitioners had conceded jurisdiction of the state court over the subject matter.

Not only did the court below refuse to recognize and follow the decisions of this Court, but it departed from its own decisions that an objection to jurisdiction could be raised at any time. *In re Hansen's Estate*, 117 Neb. 551, 221 N. W. 694, the court below announced the rule in Nebraska to be:

> "An objection to the jurisdiction over the subject matter may be raised at any stage of the proceedings. It may be raised for the first time on appeal."

## CONCLUSION

We respectfully submit that the petition for a Writ of Certiorari and the briefs of petitioners and respondent disclose a federal question of substance and importance,

properly and timely raised, and considered and adversely decided by the court below to petitioners, which this Court by the issuance of a Writ of Certiorari should fully hear and determine.

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